Supreme Court, U.S.
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No. 95-1003

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1995

IRINEO TRISTAN MONTOYA
Petitioner,

v.

GARY JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Fifth Circuit properly determined that under the totality of the circumstances, the trial court's supplemental instructions were not so coercive as to have unconstitutionally rendered Montoya's trial fundamentally unfair.

II. Whether the Fifth Circuit properly determined that the district court did not abuse its discretion in denying Montoya's request for discovery and an evidentiary hearing because Montoya's allegations of juror bias did not state a *prima facie* basis for habeas corpus relief.

III. Whether the Fifth Circuit properly held that the law of the parties jury instructions given pursuant to Texas Penal Code § 7.02(b) provided Montoya with adequate notice of the charges against him and were in all respects constitutional.

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Gary Johnson, Director, Texas Department of Criminal Justice, Institutional Division[1] by and

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[1] Gary Johnson has been substituted for Wayne Scott as the Respondent in this case pursuant to Rule 35.3 of the Rules of the Supreme Court of the United States, which allows for the automatic substitution of a successor public official sued in his official capacity. For clarity, Gary Johnson will be referred to as "the Director," and Irineo Montoya will be referred to as "Montoya."

through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The September 12, 1995, opinion of the United States Court of Appeals for the Fifth Circuit, reported as *Montoya v. Scott*, 65 F.3d 405 (5th Cir. 1995), is set forth in the Appendix (1-41) to the Petition.

JURISDICTION

Montoya seeks to invoke the Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). The petition for writ of certiorari was timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Montoya bases his claims on the Sixth and Fourteenth Amendments to the United States Constitution. The Texas statutory provisions involved are Texas Code of Criminal Procedure Article 37.071 (d)(2) & (e), and Texas Penal Code §§ 7.02 (a)(2) & (b), and §19.03 (a)(2). These provisions are set forth in the Appendix (142-143) to the Petition.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below:

The Director has lawful custody of Montoya pursuant to a judgment and sentence of the 107th Judicial District Court of Cameron County, Texas. On January 29, 1986, Montoya was indicted for the capital murder of John Kilheffer during the course of a robbery. A jury found Montoya guilty of capital murder on June 16, 1986. After a separate punishment hearing, the jury affirmatively answered the two special issues presented pursuant to former Article 37.071 of the Texas Code of Criminal Procedure. (Vernon Supp. 1991). In accordance with Texas

law, a death sentence was imposed. Montoya appealed to the Texas Court of Criminal Appeals, which affirmed his conviction on May 24, 1989. *Montoya v. State*, 810 S.W.2d 160 (Tex. Crim. App. 1989). Rehearing was denied on June 19, 1991. This Court denied Montoya's petition for certiorari to the Texas Court of Criminal Appeals on November 12, 1991. *Montoya v. Texas*, 112 S.Ct. 426 (1991).

On June 25, 1992, the state trial court issued a warrant ordering that Montoya be executed by lethal injection before sunrise on August 6, 1992. On August 3, 1992, the execution date was modified to September 17, 1992. Montoya filed a state writ of habeas corpus on September 15, 1992. The following day, the Texas Court of Criminal Appeals denied the writ. *Ex parte Montoya*, No. 23, 999-01 (Tex. Crim. App. Sept. 16, 1992).

Montoya then sought habeas corpus relief in the United States District Court for the Southern District of Texas, Brownsville Division. The district court stayed his execution on September 16, 1992. On February 4, 1994, the district court entered a final judgment, granting habeas relief on two claims, and denying relief with respect to the remaining twenty five claims.

The Director appealed the district court's decision to the United States Court of Appeals for the Fifth Circuit. Montoya filed a cross-appeal with respect to several of the claims denied by the district court. After full briefing and oral argument, the Court of Appeals reversed the portion of the district court's order granting habeas relief, affirmed the remaining portion, and remanded the case to the district court with instructions to deny all habeas relief. *Montoya v. Scott*, 65 F.3d 405 (5th Cir. 1995). The court denied rehearing on October 10, 1995. The Fifth Circuit's decision is the subject of Montoya's present petition for certiorari review.

B. Statement of Facts:

The facts adduced at trial are accurately set forth in the opinion of the Court of Criminal Appeals, *Montoya v. State*, 810 S.W.2d 160 (Tex. Crim. App. 1989). However, for clarification of statements contained in Montoya's Petition, it is necessary to review sections of the trial record for clarification. The chronology of the events surrounding the murder of John E. Kilheffer is set forth in Montoya's confession which was read into the record at trial. 16 R 310-19.[2] Montoya's confession is reprinted in full in the Court of Criminal Appeal's decision. *Montoya v. State*, 810 S.W.2d at 161.[3]

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[2]"Tr" refers to the transcript of Montoya's trial, which is the volume containing the written pleadings filed in the trial court. "R" refers to the statement of facts of Montoya's trial, with reference to volume and page number.

[3] The following is a synopsis of Montoya's confession: Montoya and his codefendant hitched a ride with a fifty-year-old, Spanish-speaking, white male in a Chevrolet Blazer. 16 R 310-19. The man started playing with Montoya's penis as they were driving. He asked if they wanted to go to a motel. *Id.*. Montoya said "we really didn't want to at first. But we told him that we could just ride around with him, he kept playing with me and El Polin." *Id.* "I was already mad with the Gringo as he wanted us to Fuck him as we drove around Ringgold Park." *Id.* Montoya's codefendant took out a knife and, in Spanish, proposed that they rob the man. *Id.* Montoya said he was afraid. *Id.* The codefendant told the driver to stop the Blazer so he could take a leak. *Id.* While the codefendant was out of the car, the man had Montoya's penis out of his pants and was playing with it in his hands. *Id.* When the codefendant came back to the Blazer he approached the driver's door and started "picking at" the victim to get him to move out of the driver's seat. *Id.* When he fought back, Montoya wrestled him into the back seat. *Id.* The codefendant stabbed at him from the front seat without looking, and when he continued to fight, Montoya disabled him with several blows to the head with his gun. *Id.* Montoya and his codefendant then drove to a

The details of Montoya's confession were corroborated by the testimony of Luis Martinez, investigator for the Cameron County Sheriff's Department. Martinez went to the scene of the crime and observed the victim's body and the blood stained blue jeans lying nearby. 16 R 273. Marta Elena Gamez, a key witness at trial who was not related to Montoya's codefendant, provided information that led officers to Montoya and his codefendant. 16 R 211. Ms. Gamez told her father what she knew about the death of the victim, and he called crime stoppers. *Id.* at 110. She gave officers enough information to locate and recover the victim's vehicle in Matamoros where it had been left under the codefendant's name. *Id.* at 213. Ms. Gamez was in the codefendant's home when Montoya threw a bag of papers on the bed that contained the identification of an older man who was a United States resident. *Id.* at 112-13. When the codefendant went to shower, she recalls that Montoya stayed out on the patio and talked to another woman named Gabi. *Id.* at 116. The codefendant invited them to a dance, and all seven individuals traveled to the dance in a newly acquired Blazer. *Id.* at 117-120. Ms. Gamez was seated in the back seat behind the driver's side and recalled that she got a bloodstain on her blouse. *Id.* at 120-22. Photographs introduced at trial show

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grapefruit tree grove and took the victim, who was bleeding but still alive, out of the vehicle and into the grove where they stabbed him and robbed him of his wallet and gold jewelry. *Id.* They also took his pants and shoes off. *Id.* Next, they drove back to the codefendant's house where they parked in the alley. *Id.* Montoya went to his house, showered, hid the bloody clothes, and then returned to the codefendant's house about 7:00 p.m. *Id.* The codefendant said that they were all going to Matamoros, Mexico to go dancing and Montoya agreed. *Id.*. Montoya also recalls, and various witnesses confirm, that the Blazer broke down on the way to the dance after they put regular gas in the diesel tank. 16 R 189, 205, 318. Finally, Montoya says the codefendant gave him the victim's jacket to wear when it got cold. 16 R 319.

blood smears on the outside of the Blazer. *Id.* at 221. On the inside, there were various smears and a large pool of blood behind driver's side on the floor. *Id.* at 222-24. Ms. Gamez testified that the Blazer broke down after they put gas in it and that two men stopped, helped them, let them keep the truck at their house, and drove them to the dance. *Id.* at 122-23. At the dance, Montoya and his codefendant bought drinks for everyone all night. *Id.* at 126.

Montoya's recent statements challenging the voluntariness of his confession are incomplete. *See* Petition at 3. The issue of voluntariness was addressed at the trial and the statements were determined to be voluntary. Tr 80-81. This finding was upheld on appeal, and the Court of Criminal Appeals summarized the relevant testimony. *See Montoya v. State*, 810 S.W.2d at 173. In sum, the testimony revealed that the investigator did not question Montoya on the evening he was arrested because Montoya was intoxicated, not because officers were attempting to coerce him. 16 R 243, 289. Montoya was served with an arrest warrant and his rights were read to him in Spanish before he was questioned. *Id.* at 244, 290. Montoya indicated he understood his rights. *Id.* at 247, 249, 290. Montoya gave his statement in Spanish. *Id.* at 250. It was translated into English by the Officer. *Id.* at 251. Additionally, before Montoya signed the statement in front of two witnesses, Officer Garza read it back to him in Spanish. 15 R 130, 16 R 254, 298.

The facts relevant to Montoya's challenge to the trial court's supplemental jury instructions were summarized by the Fifth Circuit as follows:

> After deliberating on the special issues for an hour and forty minutes, the jury foreman sent the court two notes. The first read: "We have not been able to reach a unanimous decision on yes or no." The second, which the court received minutes later, read: "We are awaiting further

> instructions. We are all definite in our decisions." The court proposed asking the jury, "Ladies and Gentlemen of the Jury: Without telling me for what answer the jury has cast its votes, could you please indicate what the numerical vote is for each special issue?" While the court discussed this proposal with counsel, the jury sent a third note indicating that they were no longer deliberating and were awaiting further instructions. Defense counsel moved for a directed verdict, and the court, which noted that the jury had been deliberating for only an hour and forty minutes, overruled the motion and sent its note inquiring as to the jury's vote.
>
> The jury responded that it was divided nine to three on the first special issue and ten to two on the second special issue. Defense counsel renewed his motion for a directed verdict, but the court sent the following note to the jury: "Would you please deliberate for another 30 minutes to see if you are able to reach an answer to the special issues in accordance with the Court's instructions and please report to me after that." Forty minutes later, the jury informed the court that it had reached a verdict.

Montoya v. Scott, 65 F.3d at 408-09.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 10.1 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Montoya has advanced no special or important reason for the Court to exercise its jurisdiction and no such reasons exist.

II.

THE FIFTH CIRCUIT CORRECTLY DETERMINED THAT THE SUPPLEMENTAL JURY INSTRUCTIONS GIVEN BY THE TRIAL COURT AT THE PUNISHMENT PHASE DID NOT RENDER MONTOYA'S TRIAL FUNDAMENTALLY UNFAIR.

Montoya contends that supplemental jury instructions given by the state trial court coerced the jury into answering the special issues affirmatively. Montoya bases this claim upon the fact that the state trial judge, while requesting not to be told in which direction the jurors had answered, questioned the jury as to their numerical division, and subsequently requested the jury to deliberate for another thirty minutes to "see if you [the jury] are able to reach an answer to the special issues. . ." 18 R 95. Montoya's petition, premised on direct appeal rather than federal habeas standards, restates the arguments advanced and rejected in the court below. Montoya's request for certiorari review of the Fifth Circuit's decision is nothing more than a disagreement with the lower court's application of a properly stated rule of law, and as such, is not worthy of this Court's review.

Alternatively, if evaluated on the merits using the correct habeas corpus standards, it is clear Montoya was properly denied relief because the supplemental instructions did not render his trial fundamentally unfair.

The proper inquiry for evaluating the coerciveness of supplemental instructions in federal habeas review is whether, when considered in context and under all the circumstances of the case, the instruction was so coercive that it rendered the trial fundamentally unfair. *Lowenfield v. Phelps*, 484 U.S. 231, 240 n.3 (1988). The application of a due process analysis on habeas review, rather than the *per se* reversal approach applied when federal courts are exercising their supervisory powers over federal criminal trials on direct appeal, is firmly grounded in this Court's decisions in *Lowenfield v. Phelps*, 484 U.S. 231, 240 n.3 (1988), and *Cupp v. Naughten*, 414 U.S. 141, 146 (1973). While the Sixth and Fourteenth Amendments guarantee a criminal defendant the right to a fair and impartial jury, that right is not violated by the comments and requests of the trial judge unless unconstitutionally coercive when viewed in "context and under all the circumstances of [the] case." *Lowenfield v. Phelps*, 484 U.S. at 237, *quoting Jenkins v. United States*, 380 U.S. 445, 446 (1965).

In *Lowenfield*, this Court applied the general principle of *Jenkins*, that the instructions must be examined in context. But the Court distinguished the *Jenkins* holding as unavailing to Lowenfield, both because the decision was based on the Court's supervisory powers and because the trial court's choice of language was uniquely coercive. *Lowenfield v. Phelps*, 484 U.S. at 239. The Court held that the difference between the *Lowenfield* trial court's request to continue deliberating and the *Jenkins* trial court's statement that "[y]ou have got to reach a decision in this case" was "sufficiently obvious to show the fallacy of petitioner's reliance." *Id.* Similarly, the request of Montoya's trial court--to deliberate for another thirty minutes to see if they could reach an answer to the special issues--is much less coercive than a command that the jury must reach a decision

in the case. In fact, the language chosen in the present case assured the jury that they would not be held indefinitely if they could not reach a verdict.

Lowenfield emphasized that supplemental instructions have long been approved and that the state has "a strong interest in having the jury 'express the conscience of the community on the ultimate question of life or death.'" *Id. citing Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968). As an example of a permissive supplemental instruction to continue deliberating, the *Lowenfield* Court stated that, "[s]urely if the jury had returned from its deliberations after only one hour and informed the court that it had failed to achieve unanimity on the first ballot, the court would incontestably have had the authority to insist that they deliberate further." *Id.* Like the Court's example, Montoya's jury had only been deliberating on the punishment-phase issues briefly, less than two hours, and the state had an interest in determining if it was possible for the jurors to return to the jury room for a final attempt at resolving their differences.

Thus, when considered on its merits, applying the correct legal standard, it is clear that Montoya's challenge to his jury instructions in unavailing. The supplemental instructions, when viewed in light of all the circumstances of the present case, did not render Montoya's trial fundamentally unfair. Particularly in light of the fact that the jury had been deliberating for such a short period of time, the trial court's singular inquiry into the jury's numerical division and request to continue deliberations for another thirty minutes to see if it could reach an answer to the special issues was not unconstitutionally coercive. The court's request did not constitute a deadline. Rather, the court's instruction let jurors know that if they reached a position where their differences were irreconcilable they would not be forced to continue. Unlike the jury in *Jenkins*, Montoya's jury was not told that they "must reach a verdict." 380 U.S. at 446. The fact that the court could "assume" or "deduce" what verdict the majority favored does not render the subsequent singular request to continue deliberation unconstitutionally coercive. Any

coerciveness that may have been implied from the court's presumed knowledge of the direction of the division was outweighed by the court's explicit statement that it was not concerned with knowing which direction the jury was leaning.

Moreover, the line of circuit court cases Montoya relies on to support his contention that the trial court's instructions were unconstitutionally coercive is not persuasive.[4] Even Montoya's strongest supporting authority, the Ninth Circuit's holding in *Jimenez v. Myers*, is unavailing.[5] While the Ninth Circuit acknowledged the distinction between direct and habeas review of jury instructions, its willingness to be "the first case anywhere that equates a neutral inquiry into the jury's division with the dynamite portion of an Allen charge" demonstrates a disregard for the preservation of the principals of comity and federalism and a misperception of the federal court's role in the review of state court decisions. *Jimenez v. Myers*, 12 F.3d at 1484. California, like Texas, does not forbid the state court's

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[4] Montoya's continued reliance on *Brasfield v. United States*, 272 U.S. 448 (1926), and *United States v. Lindell*, 881 F.2d 1313 (5th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990), is misplaced. These cases stand for the proposition that inquiry into the numerical division of the jury constitutes *per se* grounds for reversal. The *per se* reversal approach applied when federal courts are exercising their supervisory powers over federal criminal trials on direct appeal does not apply on habeas review. *Lowenfield v. Phelps*, 484 U.S. at 240 n.3. These authorities were also analyzed and appropriately rejected by the Fifth Circuit. *Montoya v. Scott*, 65 F.3d at 409-415; *see also Jimenez v. Myers*, 12 F.3d 1474, 1483-85 (Kozinski, J., dissenting) (discussing decisions of federal circuits which have "uniformly rejected" similar constitutional challenges to jury instructions).

[5] 12 F.3d 1474 (9th Cir. 1993), *cert. denied*, 115 S.Ct. 60 (1994), *superseded by* 40 F.3d 976 (9th Cir. 1994) (circuit re-analyzed facts and held that instruction given was actually *de facto Allen* charge that violated due process because it "crossed the line between neutral inquiry [into a jury's numerical division] and coercive instruction), *cert. denied*, 116 S.Ct. 63 (1995).

inquiry into the numerical division of the jury. *Id.* at 1481. As the *Jimenez* dissent pointed out, the federal court's willingness to hold such a practice unconstitutionally coercive "foreclose[s] the State of California from pursuing the approach it prefers merely because this approach doesn't conform to the mold cast by the federal courts." *Id.* at 1485. The Ninth Circuit's decision is an example of a federal court's refusal to adhere to its limited role in reviewing state convictions. The Fifth Circuit's refusal to follow the Ninth Circuit down this path was laudatory and does not present anything for this Court's review.

Thus, the circuit properly concluded that the trial court's supplemental instructions to continue deliberating for thirty minutes, when considered along with its single inquiry as to the numerical division of the jury with respect to the special issues, were "not under the circumstances so coercive as to have rendered Montoya's trial fundamentally unfair." *Montoya v. Scott*, 65 F.3d at 413.[6] The Fifth Circuit reversed the district court's decision on this issue because the federal district court evaluated the trial court's supplemental instructions under a direct appeal rather than a habeas corpus standard. *Montoya v. Scott*, 65 F.3d at 409.[7] The Fifth Circuit's decision was supported by authorities in the Fourth, Fifth, Sixth, Seventh,

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[6] The Fifth Circuit's *de novo* review was proper because the district court had failed to apply the proper legal standard to the facts of the case. *See also Boyd v. Scott*, 45 F.3d at 882 (mixed questions of law and fact involved in determining whether trial court's instructions were unconstitutionally coercive properly reviewed *de novo*).

[7] The district court applied the rulings of two decisions, *Brasfield v. United States*, 272 U.S. 448 (1926), and *United States v. Lindell*, 881 F.2d 1313 (5th Cir 1989), *cert. denied*, 496 U.S. 926 (1990), to the facts of Montoya's case and determined that the jury was coerced into an affirmative decision by the court's inquiry into its numerical division.

Eighth, and Ninth Circuits.[8] These decisions correctly apply this Court's decision in *Lowenfield* and illustrate a general consensus among the circuits concerning the proper analysis on federal habeas review for determining the validity of supplemental instructions. As such, they further illustrate that this claim is not worthy of this Court's review.

In sum, the lower court's decision simply applied the well-settled *habeas* law to the facts of Montoya's case and properly determined that complaints of coercion did not meet the constitutional threshold. This determination was supported by Supreme Court precedent and by the entirety of the record. Accordingly, there is nothing which would warrant this Court's certiorari review of this issue.

III.

THE DISTRICT COURT PROPERLY DENIED DISCOVERY AND AN EVIDENTIARY HEARING ON MONTOYA'S CLAIM OF JUROR BIAS.

Montoya contends that the Fifth Circuit erroneously affirmed the district court's decision to deny him discovery and an evidentiary hearing on his claim of juror bias. Montoya's

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[8] *See Boyd v. Scott*, 45 F.3d 876, 881 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 1964 (1995); *Williams v. Parke*, 741 F.2d 847, 851 (6th Cir. 1984), *cert. denied*, 470 U.S. 1029 (1985); *Locks v. Sumner*, 703 F.2d 403, 406-07 (9th Cir.), *cert. denied*, 464 U.S. 933 (1983); *United States ex rel. Kirk v. Director Dep't of Corrections*, 678 F.2d 723, 727 (7th Cir. 1982); *Cornell v. Iowa*, 628 F.2d 1044, 1048 (8th Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *Ellis v. Reed*, 596 F.2d 1195, 1200 (4th Cir.), *cert. denied*, 444 U.S. 973 (1979); *United States v. Cheramie*, 520 F.2d 325 (5th Cir. 1975); and *Bryan v. Wainwright*, 511 F.2d 644 (5th Cir.), *cert. denied*, 423 U.S. 837 (1975).

claim of juror bias is based on his allegation that Juror Norma Gonzalez knew the victim as a customer in the restaurant in which she worked and failed to disclose that information during voir dire. This allegation is supported solely by an affidavit signed by another juror in October of 1992 and presented for the first time during federal habeas review. Montoya contends the district court abused its discretion when it denied his request to depose Juror Gonzalez to determine whether or not she lied during voir dire when asked if she knew the victim.[9]

At the outset, Montoya's claim is barred by the principles announced in *Keeney v. Tamayo-Reyes*, 504 U.S. at 11-12.[10] Montoya was precluded from presenting the affidavit in support of his claim for the first time in federal court when he did not avail himself of the opportunity to develop those facts in the state proceeding. In the court below, the concurring judges were appropriately critical of the fact that Montoya's state petition "merely stated 'on information and belief' that a juror knew the victim . . . [and] did not attach the affidavit of the other juror that he soon after filed in federal court, nor was there any allegation that the juror's acquaintance with Montoya was just discovered or was not discoverable sooner." *Montoya v. Scott*, 65 F.3d at 422. Accordingly, because Montoya failed to develop the material facts surrounding the issue of juror disqualification in state court, he was not entitled to an

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[9]The district court rejected Montoya's attempt to introduce the affidavit presented for the first time on federal habeas review based on this Court's decision in *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11 (1992). Appendix to the Petition at 86-88. Alternatively, the district court rejected this claim on its merits because the affidavit, even if presumed true, failed to demonstrate that the juror failed to answer honestly a material question. *Id., citing McDonough Power Equipment Inc. v. Greenwood*, 464 U.S. 548 (1984).

[10] *See also Montoya v. Scott*, 65 F.3d. at 422 (Garwood, J., and Jones., J., concurring) (discussing the application of *Keeney* to the facts of Montoya's case).

evidentiary hearing in federal court unless he could establish cause and prejudice for his default. *Keeney v. Tamayo-Reyes*, 504 U.S. at 11.

At no time during his federal habeas review has Montoya made any effort to demonstrate his entitlement to one of the exceptions to the rule announced in *Keeney*, and his present petition is no exception. Instead, Montoya dismisses *Keeney* as inapplicable because it was "founded on the statutory exhaustion requirement of 28 U.S.C. § 2254." Petition at 20. Montoya argues that by waiving the requirement of exhaustion generally, the Director has also waived the *Keeney* requirement that the material facts be developed for the first time in state court. Montoya offers no legal support for his position that a general statement concerning waiver of the requirement of exhaustion of the claim constitutes waiver of this Court's independent requirement that litigants fully develop their claims while in state court. Montoya's argument must certainly be rejected in this case because the federal district court did not rely on the Director's general statement of waiver in order to address the claim because it was presented to the state court.

Moreover, the *Keeney* bar was not waived in the present case because it was first asserted and applied in district court. It was also asserted and applied in the Fifth Circuit.

Further, unlike the exhaustion requirement which, unless waived, requires a litigant to return to state court to present the claim, *Keeney* requires a litigant--while in state court--to present all of the factual support for his claim. The *Keeney* requirement is not overcome by returning to state court, but rather by establishing cause and prejudice for the default or by demonstrating a need for applying the limited fundamental miscarriage of justice exception.

Finally, the propriety of the *Keeney* bar is plainly illustrated in the present case. Concerns of finality, comity, judicial economy, and channeling the resolution of claims to the

most appropriate forum are at the core of this Court's decision to extend the cause and prejudice standard to a litigant's failure to develop the factual basis for his claims in state court. *Keeney v. Tamayo-Reyes*, 504 U.S. at 11-12. Forcing habeas litigants to present all of the factual support for their allegations at the earliest possible juncture--on pain of waiver--may be the only way to preserve the proper scope of habeas litigation and prevent litigants from sandbagging evidence to circumvent unfavorable state court factual findings. Pursuant to the principles announced in *Keeney*, Montoya was clearly precluded from relying on an affidavit presented for the first time in federal court, and if certiorari review were granted, the circuit court's decision would properly be upheld on this basis.

Alternatively, even if the district court's denial of discovery were not supported by *Keeney*, Montoya's claim is not worthy of this Court's review because the district court's denial of Montoya's request to depose Juror Gonzalez was not an abuse of discretion. Parties to a federal habeas action under 28 U.S.C. § 2254 generally are not entitled to discovery under the Federal Rules of Civil Procedure. Rather, under Rule 6 of the Rules Governing Section 2254 Cases in the United States District Courts, a party may invoke discovery processes only if and to the extent the court grants leave "for good cause shown." Although the Rules do not define "good cause," the Advisory Committee Note to Rule 6 explains that the rule is consistent with the Supreme Court decision in *Harris v. Nelson*, 394 U.S. 286 (1969). In *Harris*, this Court reasoned that habeas actions are particularly unsuited for literal application of the civil discovery rules and concluded that

> in appropriate circumstances, a district court, confronted by *a petition for habeas corpus which establishes a prima facie claim for relief*, may use or authorize the use of suitable discovery procedures . . . reasonably fashioned to elicit facts necessary to help the court to

> "dispose of the matter as the law and justice require."

394 U.S. at 290 (emphasis added; citation omitted); *see also East v. Scott*, 55 F.3d 996, 1000-02 (5th Cir. 1995); *Ward v. Whitley*, 21 F.3d 1355, 1366 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 1257 (1995) (Rule 6 does not authorize a fishing expedition. . . . 'Habeas corpus is not a general form of relief for those who seek to explore their case in search of its existence.'" (citation omitted)).

Initially, Montoya argues that his petition for habeas corpus relief established a *prima facie* claim for relief on the issue of juror bias because his allegations establish both prongs of this Court's decision in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984). In *McDonough*, the Court held that "a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." *Id.* at 556. However, the application of the rule announced in *McDonough*, a civil case on direct appeal, to claims of juror bias in federal habeas review has not been established. *See Murphy v. Florida*, 421 U.S. 794, 798 (1975). Thus, reliance on the *McDonough* direct appeal standard as sufficient to establish a constitutional violation cognizable on habeas review would require the announcement of a new rule of constitutional law and would accordingly be barred by the principles announced in *Teague v. Lane*, 489 U.S. 288 (1989). The *Teague* bar aside, it is still unclear whether a violation of *McDonough* would be sufficient to establish a due process claim for habeas relief. If violation of the *McDonough* standard does not constitutes a violation of due process, then the habeas petitioner has failed to establish a *prima facia* claim. In turn, the petitioner would not be entitled to discovery on the issue even if he could prove both prongs of the *McDonough* direct appeal standard.

Assuming *arguendo* that a violation of the *McDonough* standard would constitute a due process violation, and assuming

a claim on these grounds was not *Teague* barred or *Keeney* barred, Montoya's claim is nevertheless without merit. Montoya's factual allegations would only have required the district court to permit discovery *if* he could establish a *prima facie* legal claim and *if* the specific allegations, which may not be speculative or conclusory, establish good cause for discovery. *See Harris v. Nelson*, 394 U.S. 286; and *Blackledge v. Allison*, 431 U.S. 63, 74 (1977). Montoya's allegations did not meet this threshold. The allegation that Juror Gonzalez lied during voir dire when she did not inform the court that she knew a man from Corpus Christi with the name of John Kilheffer requires speculation based on hearsay statements of another juror presented in an untimely affidavit. Based on the affidavit, it is equally plausible that Juror Gonzalez did not recall the man until his identity was developed during the trial. Accordingly, Montoya's claim that Juror Gonzalez answered untruthfully during voir dire is supported by nothing more than a conclusory allegation and, therefore, does not entitle him to habeas relief or an evidentiary hearing to "explore" his claim. *See Blackledge v. Allison*, 431 U.S. at 74 ("presentation of conclusory allegations unsupported by specifics is subject to summary dismissal").

The second prong of the *McDonough* standard--that a truthful answer would have constituted a valid basis for a challenge for cause--was not satisfied either. A "truthful" answer, presuming *arguendo* that the answer given was not, would prove only that the juror may have been biased toward the victim. It would not establish that the juror was biased against the defendant. The circuit court correctly applied the state law, which does not provide a challenge for cause based on a juror's knowledge of the victim, to conclude that Montoya could not meet the second prong of the *McDonough* standard. *Montoya v. Scott*, 65 F. 3d at 419. Montoya does not dispute the circuit's interpretation of state law. Rather, he endeavors to demonstrate that the juror could have been challenged based on her bias against the defendant--*which he asks this Court to presume* based on the juror's "failure to tell the truth during voir dire." Petition at 22. Montoya's attempt to fulfill his burden of

proof on the second prong of the *McDonough* standard by bootstrapping with the speculative allegations he asserted in support of the first prong should afford him no relief.

Additionally, Montoya argues that he did not have to establish a *prima facia* case under *McDonough*, because under Habeas Rule 6 discovery is *permitted* to *establish* a *prima facia* case for relief. This argument is unavailing as it is contrary to this Court's holding in *Harris v. Nelson*, which requires a litigant to establish a *prima facia* case before the court "may use or authorize the use of suitable discovery procedures." 394 U.S. at 290.

It is therefore clear that the Fifth Circuit properly rejected Montoya's challenge to the district court's discovery ruling and affirmed the district court's decision. The Fifth Circuit properly applied the two-step analysis outlined in the circuit's prior decision in *East*, which was based on Rule 6 of the Federal Rules Governing § 2254 Cases, the principles announced by this Court in *Townsend v. Sain*, 372 U.S. 293 (1963), and the circuit's prior decision in *Ward v. Whitley*, 21 F.3d 1355, 1367 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 1257 (1995). *East v. Scott*, 55 F.3d at 1002. In evaluating whether Montoya had met his burden on the first prong of *East*, the circuit applied, *arguendo*, the *McDonough* standard to the facts of Montoya's case.[11] The circuit court reasoned that Montoya's request could not pass the first step of the *East* test because his allegations did not establish a *prima facia* case under

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[11] The circuit applied the *McDonough* standard in this habeas case without deciding whether the standard would necessarily be sufficient to obtain habeas relief generally, and without determining whether application of the standard in a habeas case would violate the principles announced in *Teague v. Lane*, 489 U.S. 288 (1989). Because the relief Montoya seeks *would* require the application of a new rule of constitutional law, Montoya's claim is barred, and for this additional reason does not merit the certiorari review of this Court.

McDonough. *Id.* ("Montoya's claim fails on the second prong of the *McDonough* standard because he has failed to establish that Juror X's correct response, that is, that she knew Kilheffer, would have constituted a valid basis for challenging Juror X for cause").[12] Correspondingly, the circuit court properly held that the district court did not abuse its discretion in denying Montoya's request for discovery and an evidentiary hearing. *Montoya v. Scott*, 65 F.3d at 419. Thus, there is nothing which would warrant this Court's certiorari review of this claim.

IV.

THE FIFTH CIRCUIT PROPERLY HELD THAT THE LAW OF THE PARTIES JURY INSTRUCTIONS GIVEN PURSUANT TO PENAL CODE SECTION 7.02(b) WERE CONSTITUTIONAL.

The Fifth Circuit reversed the federal district court's grant of habeas relief on Montoya's claim that the law of the parties jury instructions violated the notice provisions of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. In his petition to this Court, Montoya contends that because conspiracy was not charged in the indictment, he received inadequate notice of the charges against him and of the state's intended reliance on a conspiracy theory of criminal liability. Montoya's request to extend the right not to be

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[12] The court noted that it was "questionable whether Montoya's allegations state a *prima facie* case with respect to the first prong" because his allegations "may, to some degree be speculative, and speculative allegations are insufficient to entitle a habeas petitioner to discovery and an evidentiary hearing." *Montoya v. Scott*, 65 F.3d at 419 n. 28. When read in context, the essence of the Fifth Circuit's ruling was *not*, as Montoya argues, supportive of a finding that the Loomis affidavit was sufficient to support a *prima facie* claim on the first prong of the *McDonough* standard.

convicted of an *offense* with which he was not charged to include a constitutional right to have the specific theory of criminal responsibility stated in the indictment is unavailing. Even if this extension were not barred by *Teague v. Lane, supra,* Montoya is not entitled to habeas relief because the instructions did not have a substantial and injurious effect on the jury's verdict.

It is well settled that a defendant may not be convicted of an offense with which he was not charged. *Jackson v. Virginia,* 443 U.S. 307, 314 (1979); *Dunn v. United States,* 442 U.S. 100, 106, (1979); *Presnell v. Georgia,* 439 U.S. 14, 16-17 (1978); *Cole v. Arkansas,* 333 U.S. 196, 200-01 (1948). "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge." *Cole v. Arkansas,* 333 U.S. at 199. However, Montoya was not charged with the offense of conspiracy, and the law does not require that a defendant be given explicit notice in the indictment when he is being charged on a theory of aiding and abetting a crime. The question of whether an instruction given pursuant to 7.02(b), the conspiracy section of Texas' law of the parties statute, constituted an instruction of the independent offense of conspiracy is a matter of state law that has been specifically resolved against Montoya.[13] The law of the parties charge has been upheld in

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[13] The Texas courts have routinely upheld instructions like the one that was given in Montoya's case in cases where the offense of conspiracy was not formally charged. *Montoya v. State,* 810 S.W.2d at 165, and cases cited therein; *Nix v. State,* 750 S.W.2d 348, 354-55 (Tex. App. -- Beaumont 1988); *Leger v. State,* 688 S.W.2d 130, 131-32 (Tex. App. -- Beaumont 1985, no pet.); *Flores v. State,* 681 S.W.2d 94, 97 (Tex. App. -- Houston [14th Dist] 1984), *aff'd,* 690 S.W.2d 281 (Tex. Crim. App. 1985). Nevertheless, the federal district court, without citation to any authority, held that "[d]espite the opinion set forth by the Texas Courts it appears obvious that § 7.02 (b) was intended only to apply in instances where the State is seeking to hold

the Fifth Circuit as constitutional because the intent inherent in the law of the parties theory of criminal responsibility is sufficient to support the verdict of guilt, and the jury's finding of deliberateness is sufficient to support the death sentence. *Selvage v. Lynaugh*, 823 F.2d 845 (5th Cir.), *cert. denied*, 484 U.S. 933 (1987); *accord*, *Jacobs v. Scott*, 31 F.3d 1319, 1329 (5th Cir.), *cert. denied*, 115 S.Ct 711 (1995); *see also*, *Skillern v. Estelle*, 720 F.2d 839, 846-47 (5th Cir. 1983), *cert. denied*, 469 U.S. 873 (1984) (law of the parties theory of criminal responsibility may support capital murder conviction). The Fifth Circuit's decisions to uphold the law of the parties instructions are consistent with this Court's reasoning that it is "beyond constitutional challenge" that a state has the authority to make the aider and abettor to a crime equally responsible, as a matter of law, with the principal. *Lockett v. Ohio*, 438 U.S. 586, 602 (1978); *see also Nye & Nissen v. United States*, 336 U.S. 613, 618-19 (1949) (one who aids, abets, counsels, commands, induces, or procures the commission of an act is as responsible for that act as if he committed it directly).[14] A conspiracy theory of criminal responsibility, like the aiding and abetting

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the defendant responsible for the criminal acts of another committed in the course of a conspiracy." R 125. The district court's grant of relief on this basis was properly reversed by the Fifth Circuit because the holding specifically conflicted with the Court of Criminal Appeal's decision in *English v. State*, 592 S.W.2d 949, 955 (Tex. Crim. App.), *cert. denied*, 449 U.S. 891 (1980) (section 7.02(b) applies to capital murder cases).

As a federal court, the district court could find that a state law violated due process, but it could not interfere with the state court's interpretation of state law. *Smith v. Phillips*, 455 U.S. 209, 221 (1982).

[14] A defendant accused of an offense on an aiding and abetting theory may be convicted even if the principal has been acquitted of the same charge. *Standefer v. United States*, 447 U.S. 10, 26 (1980).

theory of joint criminal liability, is properly within the state's authority to define and apply. Moreover, the Eighth Amendment does not prohibit the imposition of the death penalty under a conspiracy theory of criminal responsibility. *See Tison v. Arizona*, 481 U.S. 137, 157-58 (1987) ("the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result"). Consequently, "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy" the constitutional culpability requirement. *Id.* at 159; *see also Nichols v. Scott*, 69 F.3d 1255, 1266 (5th Cir. 1995), *citing Shad v. Arizona*, 501 U.S. 624 (1991).

In Montoya's case, the jury was not instructed on an offense with which he was not charged. Montoya's indictment did not charge him with the offense of conspiracy, Tr 2, and his verdict form did not permit his jury to convict him of that offense. Tr 96-97. The indictment charged Montoya and Juan Fernando Villavicencio with "intentionally and knowingly" causing the death of John E. Kilheffer by stabbing him with a knife while "the said defendants were then and there in the course of committing and attempting to commit the offense of robbery of John E. Kilheffer." Tr 2. The trial court instructed the jury that it must find beyond a reasonable doubt that Montoya specifically intended to kill Kilheffer. Tr 85. The court further instructed the jury that a person is criminally responsible as a party to an offense if the offense is committed by his own conduct, or if the offense is committed by the conduct of another, where the person solicits, encourages, directs, aids, or attempts to aid the other person in the commission of the offense. Tr 86. The court's charge also

instructed the jury on the conspiracy portion of the law of the parties statute.[15]

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[15] Pursuant to TEX. PENAL CODE § 7.02(b), the jury was instructed:

> If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, then all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out [of] the conspiracy. Capital Murder, murder, robbery, and attempted robbery are felonies.
>
> By the term "conspiracy" as used in these instructions, is meant an agreement between two or more persons, with intent that a felony be committed, that they, or one or more of them, engage in conduct that would constitute the offense. An agreement constituting a conspiracy may be inferred from acts of the parties.
>
> Now, if you find from the evidence beyond a reasonable doubt that Irineo Montoya aka "El Ney" and Juan Villavicencio . . . entered into an agreement to commit the offense of robbery, as above defined, of John E. Kilheffer, and pursuant to that agreement, they did carry out their conspiracy and that on or about the 17th day of November, 1985, in Cameron County, Texas, while in the course of committing such a robbery, Juan Villavicencio . . . intentionally caused the death of John E. Kilheffer, by stabbing him with a knife with the specific intent to kill John E. Kilheffer, and that the defendant Irineo Montoya aka "El Ney" pursuant to the conspiracy, if any, with the intent to promote and assist Juan Villavicencio . . . in the commission of said robbery, then and there, at the time of the stabbing, was acting with and aiding,

Contrary to Montoya's contentions, and the conclusion of the federal district court, the trial court's instructions merely stated the extent to which codefendants may be held jointly responsible under Texas law. As a factual matter, Montoya had notice that the law of the parties theory of criminal responsibility would apply to his case. Montoya and his codefendant were indicted together and arraigned together on the capital murder charge. Tr 2. During *voir dire*, the district attorney constantly discussed the theory of shared criminal responsibility with the members of the jury venire.[16] Thus, regardless of the fact that

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> or attempting to aid, Juan Villavicencio . . . in the execution of the robbery of John E. Kilheffer, if any, and that the stabbing of John E. Kilheffer was committed in furtherance of the conspiracy, if any, of Irineo Montoya, aka "El Ney," and Juan Villavicencio . . to rob John E. Kilheffer, and that the stabbing of John E. Kilheffer, if any, was an offense that should have been anticipated as a result of the carrying out of the conspiracy, then you will find the defendant, Irineo Montoya aka "El Ney," guilty of Capital Murder.
>
> Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant, Irineo Montoya aka "El Ney", of Capital Murder.

Tr 86-87.

[16] 9 R 44-46, 84-85, 127-29, 153-55, 181-82, 212-14, 229-31, 257-59, 288-90; 10 R 305-07, 323-25, 341-42, 387-90, 442-43, 480-81, 509-11, 536-38, 554-56; 11 R 588-89, 615-17, 634-36, 664-68, 677-78, 697-99, 721-23, 734-36, 771-73, 794-95, 808-09, 835-37, 887-89; 12 SR 912-14, 942-44, 969-70, 983-86, 1007-09, 1020-22, 1040-44, 1064-66, 1084-86, 1109-10, 1139-41, 1154-55, 1173-75; 13 R 1192-94, 1216-17, 1256-58, 1278-79, 1302-05, 1322-23, 1339-40, 1370-71, 1396-97.

the indictment did not set forth each of the specific law of the parties theories under which the codefendants could be held accountable, each defendant was given ample notice that he could be held responsible for the criminal acts of his codefendant.

The jury instructions that were given at the guilt/innocence phase of Montoya's trial, like his indictment, satisfy the constitutional requirements for criminal culpability. The instructions did no more than track the statutory language of Sections 7.02(a)(2) and 7.02(b).[17] The conspiracy language in the criminal responsibility statute, and in Montoya's jury charge, provided an alternative basis for holding a defendant criminally responsible for an offense actually committed by another. *See Nix v. State*, 750 S.W.2d 348, 354 (Tex. App. -- Beaumont 1988). The jury was explicitly told that if Montoya's codefendant was determined to have committed the actual stabbing, Montoya could not be convicted unless "the stabbing of John E. Kilheffer . . . was an offense that *should have been anticipated* as a result of the carrying out of the conspiracy." Tr 87 (emphasis added). A jury is presumed to have followed the court's instructions. *Parker v. Randolph*, 442 U.S. 62, 73 (1979) (critical assumption underlying judicial system "is that juries will follow the instructions given them by the trial

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[17] Texas law provides that a person is criminally responsible for an offense committed by the conduct of another if, "acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense." TEX. PENAL CODE § 7.02(a)(2). The criminal responsibility statute further provides that "[i]f, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy." TEX. PENAL CODE § 7.02(b).

judge[;]" otherwise, no reason for judge to instruct jury or for appellate court to reverse conviction for improper instruction).

Moreover, there was abundant evidence in this case from which a jury could conclude that Montoya shared his codefendant's intent to murder and rob Kilheffer. The evidence supports the conclusion that Montoya was a full participant, if not the principal. Montoya admitted that, once his codefendant initially stabbed the victim, Montoya grabbed the man by the neck and forced him into the back seat of the vehicle, where he struck the victim in the head with an unloaded gun to force him into submission. 16 R 315-16.[18] Moreover, although Montoya stated that his codefendant did all of the stabbing and kept most of the proceeds of the crime, he conceded that they both wanted to rob the victim. 16 R 316, 319-21. Thus, Montoya's confession alone demonstrated that he was an active participant in both the robbery and the murder, and that he shared the requisite criminal intent.

The testimony of other witnesses placed even greater responsibility on Montoya. According to Augustin Gonzalez, Montoya's codefendant announced in his presence that it was Montoya who stabbed the victim, and Montoya, who was also present during this conversation, did not contradict the statement, but made faces like he was laughing. 17 R 391-94. Additionally, Montoya's confession, as well as the other evidence in the case, indicates that Montoya's codefendant drove the victim's vehicle. 16 R 121 188, 200; 17 R 386; 18 R 56-57. Yet the testimony of Laura Lino, who witnessed part of the assault on Kilheffer, establishes that it was the passenger of the vehicle, *i.e.*, Montoya, who was struggling with the victim and preventing his escape. 17 R 401-08.

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[18] Contrary to Montoya's representation on page 28 of his petition, the record does not support the inference that Montoya "pulled the victim to the back seat to attempt to prevent further fighting."

Finally, in his statement Montoya acknowledged that *he* was angry with the victim because of the sexual advances the victim had made toward him, particularly those made while his codefendant was out of the car. *See* note 2, *supra.* It appears from these statements that Montoya had a motive to murder Kilheffer that went beyond the robbery. In sum, at the very least, according to Montoya's version of events, he was a full participant in the robbery and murder, and at most, based on the testimony of other witnesses, Montoya was in fact the principal.

The jury instruction in Montoya's case did not therefore delineate a different crime. The instructions provided the jury with a more complete definition of the circumstances under which it could hold Montoya responsible for the actions of his codefendant. The instruction required the jury, at a minimum, to find that Montoya acted with reckless indifference to human life and was fully consistent with constitutional requirements for criminal culpability. Accordingly, neither the indictment nor the jury instructions in Montoya's case permitted him to be convicted for a crime with which he was not charged.

Furthermore, even if Montoya's claim were not barred by *Teague v. Lane, supra,* and were not without merit, it would not entitle Montoya to habeas relief because the instructions did not have a substantial and injurious effect on the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, ___, 113 S.Ct. 1710, 1722 (1993), *quoting Kotteakos v. United States*, 328 US 750, 776 (1946) (Even trial error of constitutional magnitude provides a basis for reversal only if it "had substantial and injurious effect or influence in determining the jury's verdict").

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the petition for writ of certiorari be denied.

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